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IN THE

Supreme Court of the United States

October Term, 1969.

No. 427.

DEFIANCE INDUSTRIES, INC., et al.,
Petitioners,

v.

DEBORAH TANZER and WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,
Respondents.

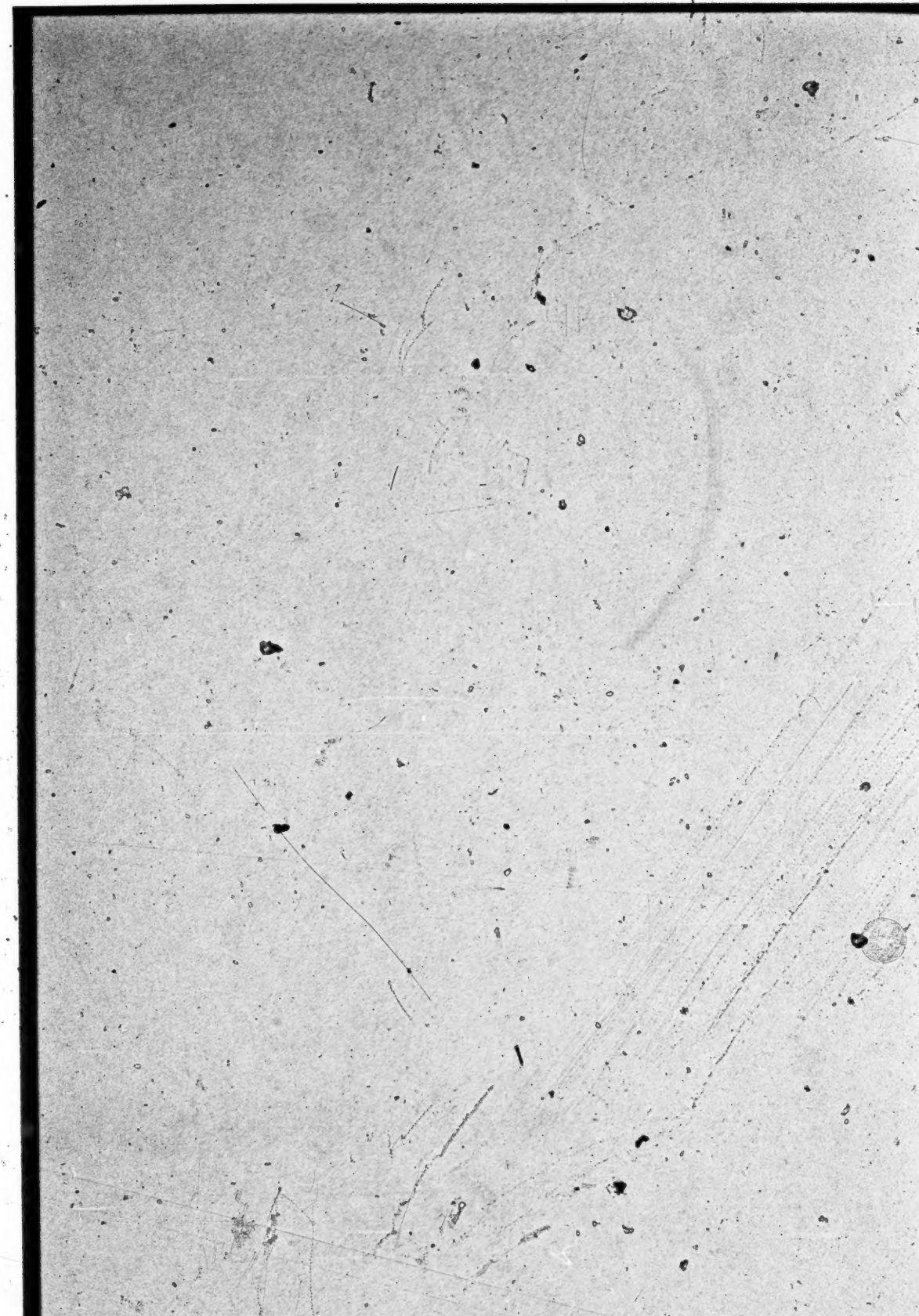
On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION.

H. ALBERT YOUNG,
BRUCE M. STARGATT,
1401 Market Tower,
Wilmington, Delaware,
Counsel for Petitioners.

JACK B. JACOBS,
YOUNG, CONAWAY, STARGATT & TAYLOR,
Wilmington, Delaware,
MURRAY I. GURFEIN,
GOLDSTEIN, GURFEIN, SHAMES & HYDE,
New York, New York,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 427.

DEFIANCE INDUSTRIES, INC.
AND B.S.F. COMPANY

Petitioners,

and

ROBERT H. HUFFINES, JR.,
EDWARD KROCK AND VICTOR MUSCAT

v.

DEBORAH TANZER AND WILLIAM PRICKETT,
RECEIVER PENDENTE LITE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION.

REPLY STATEMENT OF THE CASE.

Respondents' Brief in Opposition to the instant Petition for Certiorari, although purporting to supply "background facts" (RB 3)*, misleadingly colors the record. In

* The reference to (RB) is to the Respondent's Brief. References to "A", "PA", and "P" (following the abbreviations adopted in footnote, page 3 of Respondents' Brief) are to the Appendix to the briefs filed with the Court of Appeals, the Appendix to the Petition, and the Petition, respectively.

the interest of restoring a proper perspective Petitioners respectfully make the following submission:

(1) Respondents devote space to an elaboration of B.S.F.'s financial difficulties (RB 3-4). Why they do so is obscure, since neither the fact of B.S.F.'s financial difficulty nor the necessity for a sale of the A.S.P. stock are disputed herein. The only area of dispute concerns the procedure under which this sale was permitted to occur, a procedure so prejudicial as to warrant review by this Court.

(2) Giving only secondary attention to the problems caused by the procedure for which they were largely responsible, Respondents devote great energy to an attack upon Victor Muscat (*E.g.*, RB 5). Respondents' innuendo is that because of Muscat's involvement, no issue raised on Petitioners' behalf is genuine. Aside from the specious *ad hominem* quality of this position, the short answer is that Petitioners are corporations whose stock is largely owned by the public. Such public stockholders have a legitimate interest in obtaining the highest possible price for the sale of B.S.F.'s prime asset. To identify Muscat as a controlling stockholder of Petitioners and to call him bad names does not excuse Respondents from responsibility for safeguarding the interests of Petitioners' public stockholders.

(3) Respondents also seem to suggest that because the Seagrave offer was noticed in the mail and announced in the financial press (RB 7), some form of competitive bidding took place. Nothing could be further from fact. The notice directed that any stockholder or interested party should "appear and show cause why if any he has, why the motion of the Receiver *pendente lite* should not be granted" (38A). It did not state, nor did it suggest, that competitive bidding would be invited.

(4) Likewise, the "evidence" of A.S.P.'s value (RB 8) adduced at the December 28th hearing did not constitute an "appraisal" or even permit any conclusion of A.S.P.'s value to B.S.F. Evidence introduced by the Receiver was insubstantial and not probative of value, since no expert skilled in securities or financial analysis testified. The absence of a reliable market value for the A.S.P. stock eliminated that usually helpful yardstick of value. And the rapid-fire hearing schedule afforded Petitioners no opportunity to marshal and present meaningful evidence of value, in accordance with accepted legal standards. Accordingly, the record permits of no rational conclusion as to the value of the A.S.P. stock which was ordered sold on December 24, 1968.

REPLY ARGUMENT.

Respondents argue that the financial situation of B.S.F. required that A.S.P. be sold. Agreed. But the question on the merits is whether the need for that sale justified the use of a procedure which threw all caution to the winds, and which permitted a sale of corporate stock having no ascertainable market value without first requiring an appraisal or advance provision for public competitive bidding. We deferentially suggest that this question is sufficiently important as to require review on Certiorari.

(1) The Respondents argue that Petitioners' construction of § 2004, if adopted, constitutes "judicial legislation", would be "drastic", "rigid" and incorrect (RB 13-14). These arguments are properly addressed to the merits and are improperly proffered here.

(2) Respondents assert that the question presented has already been considered and resolved in *Stokes v. Williams,* 225 Fed. 148 (3rd 1915); *Interstate Oil Co. v. Gormley,* 105 F.2d 431 (9th Cir. 1939); *Backus v. Jaffray,* 73 F.2d 823 (8th Cir. 1934); *Cockstetter v. Williams,* 9 F.2d 354 (9th Cir. 1925); and *Smith v. Hill,* 5 F.2d 188 (3rd Cir. 1925). See RB 14. These cases, we suggest, are off the point. In *Stokes,* unlike the instant case, an appraisal of the property was had, and the applicable statute (unlike § 2004) contained no explicit procedure governing private sales of personalty. In *Hill* and *Gormley* the sale was likewise preceded by an appraisal and, in addition, the notice of the sale invited competitive bidding. *Jaffray* and *Hill* both involved sales of land, not of personalty, a distinction upon which Respondents rely heavily (RB 11); and *Cockstetter* involved a sale of assets of a national bank,

pursuant to a statute entirely unrelated to § 2004 or its predecessors. In short, none of Respondents' cited cases go so far as to permit a sale of personalty without retaining at least some cautionary procedure that enables measurement of the value of the property sold and assures that the price realized is the highest attainable. By not requiring such a procedure below, the District Court and the Court of Appeals radically departed from the accepted and sound practice. They also, we submit, acted in violation of due process.

(3) Respondents' also argue that the decision of the Court of Appeals poses no threat to the integrity of judicial sales, because the number of cases involving "extraordinary circumstances" which permit departure from § 2001 procedure will be infrequent. Such speculations lack merit since the overriding purpose of any judicial sale is to obtain the highest possible price. See authorities cited at Petition p. 9. This purpose should be implemented in all judicial sales, not just in "ordinary" ones. To relax all cautionary procedure because the circumstances are "extraordinary" invites fraud and collusion by encouraging the unscrupulous to manufacture a situation of urgency in order to justify a judicial sale at sacrifice prices.

(4) Respondents characterize Petitioners' attack upon the sale upon due process grounds as "border[ing] on the frivolous" (RB 13). Not only is this unlawyerlike rhetoric, but also the arguments advanced to support it are nonresponsive. A hearing, to be sure, was held, but on such a bang-bang basis that no meaningful evidence of A.S.P.'s value could be marshaled and presented. Also, no appraisal was ordered. Interested parties were notified, but were not invited to bid. The hearing which was held was

devoid of the safeguards designed to assure the highest possible price. Such a hearing hardly meets the requirements of due process.

(5) Lastly, the Receiver argues that B.S.F.'s "very survival" may well depend upon the outcome of this appeal (RB 15). Petitioners deferentially suggest that it comes with poor grace for the Receiver to sell B.S.F.'s prime asset in what is contended to be an illegal manner, and then to argue that only if his illegal act is countenanced will B.S.F. survive. B.S.F.'s interests will not be advanced by a sale of its major asset under a gerry-built procedure which dispenses with the minimum safeguards necessary to attain the highest price.

Petitioners have a substantial stake in B.S.F. To protect that interest Petitioners ask this Court to review what they contend to be the improper sale of B.S.F.'s main asset.

CONCLUSION.

For the reasons advanced herein and in the Petition for Certiorari, the writ should be granted.

Respectfully submitted,

H. Albert Young,
Bruce M. Stargatt,
Counsel for Petitioners.

Jack B. Jacobs,
Young, Conaway, Stargatt & Taylor,
Wilmington, Delaware,
Murray I. Gurfein,
Goldstein, Gurfein, Shames & Hyde,
New York, New York,
Of Counsel.

Dated: September 26, 1969.